United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1433

To be argued by
MICHAEL W. O'SULLIVAN

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM I. STRUB, RAMON N. D'ONOFRIO, GEORGE C. VAN AKEN, ALFRED HERBERT, PETER B. ROSENTHAL,

Defendants,

GEORGE C. VAN AKEN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

BRADY, TARPEY, DOWNEY, HOEY, P.C.
Attorneys for Defendant-Appellant George Van Aken
84 William Street
New York, New York 10038
269-1010

MICHAEL W. O'SULLIVAN
Of Counsel

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defendants,	:	
GEORGE C. VAN AKEN,	:	
defendant-appellant.	:	

BRIEF OF DEFENDANT-APPELLANT GEORGE C. VAN AKEN

ISSUES PRESENTED FOR REVIEW

The issues presented for review herein are:

First, whether in light of all the facts herein, the District Court was required to hold an evidentary hearing before denying appellant's application pursuant to 28 U.S.C. §2255;

Second, whether the appellant's allegations as to the manner in which his guilty pleas were induced constitute a valid basis for vacating his conviction and setting aside the pleas; and

Third, whether the appellant's allegations and the sentencing

transcript, in light of all the facts, herein form a valid basis for vacating the sentence.

STATEMENT OF THE CASE

Nature of the Proceedings and Disposition in the Court Below

Petitioner, George C. Van Aken, moved pursuant to 28 U.S.C. §2255 for an order vacating and/or setting aside the judgments of conviction and sentence dated May 14, 1975 on the grounds that his constitutional rights were violated by unconstitutionally induced pleas of guilty and that he was denied due process and effective representation at the sentencing hearing.

The Honorable Dudley B. Bonsal held that appellant's allegation that a promise of veto power to appellant's former counsel over every judge, except the Honorable Harold R. Tyler, Jr., and the court's refusal to grant an adjournment of sentencing and hear counsel on alleged misstatements in the sentencing report did not constitute a basis for relief. Accordingly, appellant's motion to vacate and set aside the judgments of convictions and sentencing were denied without an evidentary hearing.

Appellant appeals from the order of Judge Bonsal denying his motion without an evidentary hearing, although the application was made pursuant to 28 U.S.C. §2255 on his convictions and sen-

tencing on indictments 73 Cr. 654 and 74 Cr. 1226. The appeals were assigned numbers 75-1433 and 75-1434 by the Court of Appeals. Both appeals were consolidated under 75-1433 by order of Circuit Judge Murray I. Gurfein on February 3, 1976.

FACTS

Prior to making a request for relief pursuant to 28 U.S.C. §2255 a futile attempt was made to ascertain whether the appellant's rights had indeed been violated. After receiving no cooperation from appellant's former counsel and seeing a copy of a letter from former Assistant United States Attorney, David Brodsky, counsel contacted Mr. Brodsky in order to ascertain the full contents of the plea bargaining terms. At the suggestion of Mr. Brodsky, an attempt was made to arrange a meeting with Mr. Brodsky in the office of John R. Wing, Chief of the Frauds Unit, United States Attorney's Office for the Southern District of New York. Mr. Wing refused to permit such a meeting unless appellant's counsel waived beforehand any motion based upon misrepresentations or improper promises made to the appellant. As officers of the court, there was no alternative but to decline and make the application on the information furnished to us by the appellant (93A, 94A).

Early in the development of the cases by the United States

Attorney's Office for the Southern District of New York and after his arrest in November 1972, the appellant began to cooperate with the Government. This cooperation antedated either of the indictments to which appellant pled guilty and for which he was sentenced (43A, 64A).

In March 1973, the month in which appellant commenced his cooperating with the Government, a meeting was held in the Office of the United States Attorney. The March 5, 1973 meeting was attended by: Peter Morrison, Esq., appellant's former counsel, who was also a former U.S. Attorney; David Brodsky, Esq., Assistant United States Attorney, Southern District of New York; Joel Friedman, Esq., Organized Strike Force, Southern District of New York; and representatives of the S.E.C. and the I.R.S. The appellant was present in the Office of the United States Attorney, but did not attend the meeting (99A). Even Dominick Amorosa, Esq., Assistant United States Attorney for the Southern District of New York, did not question the fact that the meeting transpired in his opposing affidavit filed in the District Court.

After the March 5, 1973 meeting, appellant was informed that: (i) all his cases would be heard before the Honorable Judge Harold Tyler; (ii) if his cases were not before Judge Tyler, his counsel had veto power over any other judge of the Southern District; (iii) sentencing would occur prior to Mr. Brodsky's leaving the

U.S. Attorney's Office; and (iv) Mr. Brodsky would speak in his behalf at the time of sentencing. Messrs. Morrison and Brodsky informed appellant of the foregoing (35A, 36A).

Despite appellant's assertions, Mr. Amorosa denied in his opposing affidavit that such a deal was made (77A). This denial was found to be factual by the Honorable Judge Dudley B. Bonsal (111A). Yet, in spite of Mr. Amorosa's denial and Judge Bonsal's finding, Government notes dated March 5, 1973 were supplied to the appellant by the very same Mr. Amorosa which clearly state:

1. "All cases before Judge Tyler.

   - if not before Tyler

   - then Morrison has veto over judge." (69A)

2. "Sentencing prior to Brad leaving.

   - Doesn't want sentence remain open." (70A)

3. "Will plead to (3 ind.) of our devise

   - subject to further discussion maybe 2 but no less." (69A)

4. "Side agreement/no meeting me or my designate." (71A)

Mr. Amorosa sent these March 5, 1973 notes, which were according to appellant, 3500 material accepted into evidence at several trials, to the appellant with a covering letter dated June 20, 1975, some six months prior to the 28 U.S.C. §2255 motion in the

District Court (67A). These notes had to come from either the files of the U.S. Attorney's Office or other governmental sources. Apparently, Mr. Amorosa was able to locate them on at least one occasion.

In regard to the aforementioned notes, which appellant believed to have been prepared by Joel Friedman, Esq., there was no denial by Mr. Amorosa in his affidavit that: (1) he was aware of their existence; (2) they were authentic; and (3) the contents were true; (4) they were prepared by a government representative at the March 5, 1973 meeting; and (5) an agreement was arrived at on March 5, 1973. The authenticity and the contents of the notes cannot now be questioned. In every aspect, except for Mr. Brodsky speaking in appellant's behalf, they unequivocally bear out the appellant's comprehension of his plea bargaining deal.

In reference to plea bargaining, there can be no denial that a deal was struck. On August 5, 1975, David M. Brodsky wrote to John R. Wing, Esq. as follows:

> "Dear Rusty:
>
> I recently received the enclosed papers from George Van Aken regarding his feeling that the Government did not fulfill its part of the agreement with him.
>
> I cannot get involved in the middle of this dispute, as you can well understand. Part of Van Aken's feeling of being let down by the

> Office goes back to the original deal I made with him. However, I know that by turning over to you, Van Aken's grievances will be analyzed and handled properly." [Emphasis added.] (104A)

The author of the letter quoted above was the very same Mr. Brodsky who attended the March 5, 1973 meeting, spoke to the appellant and was contacted by counsel. Mr. Amorosa produced no affidavit from Mr. Brodsky to refute appellant's affidavits, the March 5, 1973 notes, or the exhibits attached to moving papers. Yet, if appellant's assertions were false, who would be more able to refute them than Mr. Brodsky in contradicting them.

The affidavit of appellant's former wife, Melinda Van Aken, clearly stated that Mr. Morrison had also informed her that he had the "right" of veto power. According to her affidavit, both appellant and she believed that either a light sentence or no sentence of imprisonment would be imposed. This was a direct result of Mr. Morrison's assertion to her that he had been granted veto power over any judge, except Judge Tyler, before whom he wanted all matters to appear (101A).

The appellant has stated in his affidavit that he would not have pled guilty, furnished the U.S. Attorney, a grand jury and the government with any information about his dealings, or testified against those persons indicted with him, were it not for the

veto power provision of his deal with the U.S. Attorney's Office and the government (37A, 38A).

Lest any doubt exists that appellant believed his counsel could have vetoed any judge, except Judge Tyler, before whom Mr. Morrison wanted all matters, the appellant testified under oath and cross examination by counsel for a codefendant in related cases that he had that right (36A). In both U.S. v. Blitz and U.S. v. Baron, he so testified before the court. In the Blitz trial he was asked:

> "Q. Didn't the government agree to allow you to plead to these indictments before Judges of your own selection?
>
> A. As it worked out, Mr. Rooney, the government allowed me to plead before the judge who was Judge Tyler, and that's where I was indicted first on Academic Development, and my attorney said that he would be satisfied if we plead before that judge. Yes, sir, that's correct." (60A-62A)

In the Baron trial, he was asked:

> "Q. Mr. Van Aken, you were arrested in November of 1972, is that correct?
>
> A. Yes.
>
> Q. And thereafter, you and your attorney worked out a deal with the government and you agreed to testify on behalf of the government?
>
> A. Yes.

Q. Did you reach that deal in March of 1973?

A. Yes.

Q. And you told us what the deal is, including your pleading guilty to two counts in two different indictments, is that correct?

A. Yes.

Q. Now, it is also a part of the deal, is it not, that you are going to plead before Judge Tyler, is that right?

A. Yes.

Q. And your testimony is that your attorney had veto power over any other judge, is that correct?

A. That is correct." (64A, 65A)

On October 17, 1974 appellant entered a plea of guilty to one count of a security fraud conspiracy, under indictment 73 Cr. 654, relating to the stock of Health Evaluation System's, Inc. before United States District Court Judge Harold R. Tyler, Jr. (74A)

On January 14, 1975 appellant entered a plea of guilty to one count of a security fraud conspiracy, under indictment 574 Cr. 1226, relating to the stock of Elinvest, Inc. before United States District Court Judge Dudley B. Bonsal (74A).

For the convenience of the U.S. Attorney's Office and the cases in which appellant was cooperating, sentencing was delayed until May 14, 1975, nearly two years after the March 5, 1973

meeting and agreement. During this time, appellant spent 200 days cooperating with the government (43A). It was during this time that Judge Tyler retired from the bench(111A).

Prior to sentencing, appellant asked his former counsel the reputation of Judge Bonsal in sentencing security law violators. Appellant then instructed counsel to exercise the veto power, since he believed Judge Bonsal would not be in appellant's best interests. At that time, he was informed that no deal for veto power had been made. Appellant assured counsel that it had been agreed to, and at the time it was done, counsel had assured him that it was a major concession from the U.S. Attorney and the Government (36A).

When the sentencing hearing commenced, appellant's counsel made an application. The transcript revealed the following:

> "MR. MORRISON: If your Honor please, on behalf of the defendant I would like to make an application.
>
> THE COURT: What is your applicatinn?
>
> MR. MORRISON: My application, if your Honor please, is for an adjournment of the sentencing on the ground that there are things in the probation report that are inaccurate reflections of the situation.
>
> THE COURT: I am not going to grant that. This presentence report has been available for a long time, and all that happened is that the defendant I think, his people came in this morning a little

> after 9 and began to look at it. They could have looked at it a long time before. It's been available. I am not going to grant that.
>
> MR. MORRISON: May I just extent my explanation.
> I understand your Honor's ruling but just for the record, if I may. One of the things in the probation report that causes concern to Mr. Van Aken relates to the picture painted by the probation report with respect to his financial situation.
> Because of an application that I previously made to withdraw I feel that I may not be the most effective advocate for Mr. Van Aken on that particular score." Sentencing Transcript, page 2, lines 6-25 and page 3, lines 1-4. [Emphasis added.] (41A)

Between May 9, 1975 and May 13, 1975, appellant was unable to contact his counsel, who was allegedly in Europe prior to that time. It was on May 9, 1975 that the appellant received the government's Sentencing Memorandum, not to be confused with the probation report, in Florida (34A). It is apparent from the court's remarks that counsel either did not or was unable to check the probation report prior to sentencing (41A). There was no opposition or claim of prejudice by Assistant U.S. Attorney Amorosa to the application by appellant's counsel.

The Sentencing Transcript subsequently revealed the following:

> "MR. AMOROSA: Your Honor, may I just say one thing. Mr. Morrison claimed that there were both omissions from the government's sentencing memorandum and misstatements of fact, but he did not indicate what he considered to be a misstatement of fact in the memorandum.

I'd just like to state that for the record.

MR. MORRISON: I'd be happy to go through that, if your Honor thinks it would be appropriate.

THE COURT: No, I don't think so. (48A)

From the record it is clear that the sentencing court never heard or cared to hear counsel on alleged misstatements of facts contained in the Sentencing Memorandum.

On May 14, 1975 appellant was sentenced to two three year terms to run concurrently and two committed fines of $10,000 each by Judge Bonsal (54A). The appellant surrendered on May 28, 1975 and has been serving his sentence in the Federal Prison Camp, Eglin Air Force Base, Florida (33A).

Despite the foregoing, appellant's motion pursuant to 28 U.S.C. §2255 for an order vacating and/or setting aside the judgments of conviction and sentence was denied as "without merit" and the court found that "petitioner is entitled to no relief." (111A)

POINT I

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION PURSUANT TO 28 U.S.C. §2255 WITHOUT HOLDING AN EVIDENTARY HEARING

An evidentary hearing was never held by the District Court prior to a determination of the merits of appellant's request for relief. 28 U.S.C. §2255 mandated the District Court to "grant a prompt hearing" when a request for relief has been made thereunder and to "determine the issues of fact and conclusions of law with respect thereto," unless "the motion and the files and records conclusively show that the prisoner is entitled to no relief." Machibroda v. United States, 368 U.S. 487, 494, 82 S. Ct. 510, 7 L. Ed. 2d 473, 478 (1962).

Appellant's motion was predicated upon: both his and his former wife's affidavits as to meetings (101A), conversations and promises not made in the courtroom and for which no court transcript was made (99A); two sections of his testimony as a Government witness in related cases (60A, 64A); a letter, dated June 20, 1973, from Assistant United States Attorney Dominic Amorosa (67A); a letter, dated August 6, 1975, from former Assistant United States Attorney David Brodsky stating that "Part of Van Aken's feeling of being let down by the Office goes back to the original deal I

made with him" (104A); and Government notes of a meeting held on March 5, 1973 (69A).

In reversing a Circuit Court and ordering an evidentary hearing the Supreme Court has stated in the circumstances set forth above that:

> "This was not a case where the issues raised by the motion were conclusively determined by the motion itself or by the 'files and records' in the trial court. The factual allegations in the petitioner's motion and affidavit, and put in issue by the affidavit, filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefor, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection." Machibroda v. United States, supra. [Emphasis added.]

A proceeding under 28 U.S.C. §2255 was "an independent and collateral inquiry into the validity of a conviction." United States v. Hayman, 342 U.S. 205, 222, 72 S. Ct. 263, 274, 96 L. Ed. 232 (1952). Relief has been held not to be available for an "error which is neither jurisdictional nor constitutional." Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 471, 7 L. Ed. 417 (1962). Relief has, however, been held to be available after a showing that a guilty plea was the product of governmental pro-

mises. Walters v. Harris, 460 F. 2d 900, cert. denied 409 U.S. 1129, 93 S. Ct. 947, 35 L. Ed. 2d 262 (1972).

Government documents which have contradicted appellant's allegations and his own documents merely created issues of fact, and did not justify the denial of a motion which stated a valid claim for relief. Machibroda v. United States, supra; United States v. Paglia, 190 F. 2d 445 (2nd Cir. 1951). The Government's contention that appellant's allegations were without merit could not have been sufficient to deny appellant an opportunity to be heard. Walker v. Johnston, 312 U.S. 275, 287, 61 S. Ct. 574, 85 L. Ed. 830, 836 (1940).

Both Assistant United States Attorney Dominick Amorosa and Judge Dudley B. Bonsal were in agreement and placed heavy emphasis on the fact that when Judge Harold R. Tyler inquired of appellant as to his understanding regarding any agreement with the United States Attorney's Office the record indicated that appellant understood that the Government would not object to his being sentenced on both indictments before one District Judge and that no other agreements had been made (77A, 111A). It is interesting to note that counsel for the Government and the defendant also apparently neglected to inform the court as to the March 1973 meeting and agreements.

While the foregoing must be taken into account in evaluating

appellant's contentions, it was not of controlling weight or significance. Mosher v. LaVallee, 351 F. Supp. 1101, 1107 (S.D.N.Y. 1972), aff. 491 F. 2d 1346 (2d Cir. 1974), cert. den. 416 U.S. 906, 94 S. Ct. 1611, 40 L. Ed. 2d 111 (1974); United States ex rel McCrath v. LaValle, 319 F. 2d 308, 314 (2d Cir. 1963). Even if upon entering his pleas appellant had gone to the extent of assuring the court that no one had promised him anything, it would not be conclusive as to whether a deal had been made. Such an answer has been recognized as standard, even though an agreement had been made. Mosher v. LaVallee, supra; United States ex rel Scott v. Mancusi, 429 F. 2d 104, 113 n. 1 (1970) (dissenting opinion), cert. den.,402 U.S. 909, 91 S. Ct. 1385, 28 L. Ed. 2d 651 (1971). Other courts have recognized that a defendant "might have thought 'that this was all part of the game and that honest answers would destroy the deal.'" Christy v. United States, 437 F. 2d 54 (9th Cir. 1971); United States v. Tweedy, 419 F. 2d 192, 193 (9th Cir. 1959). Lest it has been forgotten, appellant made his statements before Judge Tyler, the Judge specifically named in the agreement as satisfactory to appellant's former counsel and before whom appellant expected to receive minimal punishment to no sentence of imprisonment.

In light of Machibroda v. United States, supra, the other cases cited above and the circumstances, the District Court com-

mitted serious and reversible error in denying appellant's motion without an evidentary hearing.

POINT II

APPELLANT'S ALLEGATIONS THAT HIS GUILTY PLEAS WERE IMPROPERLY INDUCED BY A PROMISE OF VETO POWER OVER ANY JUDGE, EXCEPT JUDGE TYLER, STATED A VALID BASIS FOR RELIEF.

Prior to his indictments on the counts to which he pled guilty, and after a March 5, 1973 meeting in the office of the United States Attorney, appellant was told by his former counsel, William Morrison, and Assistant United States Attorney David Brodsky, that his counsel had veto power over any judge, except Judge Tyler (99A). Government notes, dated March 5, 1973, explicitly stated:

> "All cases before Judge Tyler
>
> - if not before Tyler
>
> - then Morrison has veto over judge." (69A)

This improper inducement caused appellant to enter his guilty pleas and rendered the pleas void.

In its affidavit in opposition to appellant's motion pursuant to 28 U.S.C. §2255, the United States Attorney did not controvert

appellant's allegations with respect to veto power promised on March 5, 1973 meeting. In the absence of such a refutation appellant's allegations as to the promise and the March 5, 1973 notes, must be accepted as fact for the purpose of this appeal. Teller v. United States, 263 F. 2d 871, 872 (6th Cir. 1959); Dunn v. United States, 245 F. 2d 407, 408 (6th Cir. 1959); Price v. Johnston, 335 U.S. 266, 292, 68 S. Ct. 1049, 92 L. Ed 1356 (1947). Even if they were considered as being controverted, they present a factual issue which cannot be resolved by the files and records of the case, thus making it necessary that the District Judge hold a hearing and make findings of fact and conclusions of law with respect thereto. 28 U.S.C. §2255; United States v. Hayman, 342 U.S. 205, 219-220, 72 S. Ct. 263, 96 L. Ed. 232 (1951).

The United States Supreme Court has expressly adopted the opinion of Judge Tuttle of the Court of Appeals for the Fifth Circuit in Shelton v. United States, 246 F. 2d 571, 572 N. 2 (1957) (en banc), rev'd on confession of error on other grounds, 356 U.S. 26, 2 L. Ed. 2d 579, 78 S. Ct. 563 (1958), setting forth the test for when a guilty plea must be vacated, by quoting from the learned judge's opinion as follows:

> "'[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own

> counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises) or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).' 242 F. 2d at page 115." Brady v. U.S., N.M. 1970, 90 S. Ct. 1463, 397 U.S. 742, 25 L. Ed. 2d 747, 760 (1970). [Emphasis added.]

The prosecutor has been held not to have the power to promise that a given sentence would be imposed, Johnson v. Beto, 466 F. 2d 478, 479 (5th Cir. 1972), cert. den. 410 U.S. 945, 93 S. Ct. 1395, 35 L. Ed. 2d 612 (1973), or that a court would dismiss an indictment, United States v. Cowan, 381 F. Supp. 214, 224 (1974).

There was no authority to be found on the propriety of a prosecutor granting a defendant or defendant's counsel veto power over the selection of a judge. The promise of veto power went unfulfilled when prior to sentencing its existence was denied. It was also a promise incapable of fulfillment either legally or under the facts of this case. As the court below noted:

> " . . . Judge Tyler had already resigned . . . and that sentencing before Judge Tyler would have been impossible." (111A)

In fact, after Judge Tyler's retirement, any further proceedings would have been impossible if the Judge was not to the liking of defendant's counsel and he had a valid "right" of veto power.

To the appellant the "right" of veto power was a significant

factor in his cooperation with the government and a grand jury, and the entry of guilty pleas (37A, 38A). In effect, it was, to the appellant, an insurance policy which led him and his former spouse to expect a token sentence or no sentence of imprisonment (101A).

The vice here is not that a misrepresentation was made and because of that the bargain may be rescinded. The vice was that because of the representation, the accused was improperly led to announce his guilt in the belief that, if his cases were not before a judge acceptable to his counsel, he was "protected" from any other judge. A plea which was the produce of coercion, unfulfilled, unfulfillable, improper and false promises cannot be tolerated. Brady v. U.S., supra; Shelton v. U.S., supra; Walker v. Johnston, 312 U.S. 275, 286, 61 S. Ct. 574, 85 L. Ed. 830, 836 (1940); Smith v. O'Grady, 312 U.S. 329, 334 S. Ct. 572, 85 L. Ed. 859 (1940). The appellant's allegations, supporting affidavits, the government's own notes and the government's failure to deny the March 5, 1973 conversations stated a valid basis upon which relief could have been granted.

POINT III

THE REFUSAL OF THE TRIAL COURT TO GRANT AN ADJOURNMENT OR HEAR APPELLANT'S FORMER COUNSEL ON MISSTATEMENTS IN THE SENTENCING MEMORANDUM STATED A VALID BASIS FOR RELIEF.

The sentencing record reveals that counsel for the appellant, who asserted on two occasions that he " . . . might not be the most effective advocate . . . " (42A, 46A) made an application for an adjournment of sentencing at the very outset of the proceedings on the ground that there were " . . . things in the probation report that are inaccurate reflections of the situation" (41A). Despite the absence of any objection or allegation of prejudice by the prosecutor, the court denied the application on the ground that the report had been available to the defendant and his counsel for a long time prior to this time and was not looked at until a little after 9 on the morning of sentencing (41A).

Denial of the application infringed on the defendant's rights. The defendant's rights, and not those of counsel, were involved. In a case involving an application for an adjournment, the U.S. Court of Appeals, Second Circuit, held:

> " . . . we feel that he should have given counsel sufficient time for useful examina-

> tion and rebuttal in view of the one-sided and potentially devastating disclosures of asserted bad conduct by the defendant." United States v. Rosner, 485 F. 2d 1213, 1231 (2nd Cir. 1973), cert. den. 417 U.S. 950, 94 S. Ct. 3080, 41 L. Ed. 2d 672 (1974).

Whatever the reason, the sentencing record shows in no uncertain terms that counsel for the defendant was denied the opportunity, as provided under Federal Rules of Criminal Procedure rule 32(a), 18 U.S.C.A., to inform the court and the prosecutor of misstatements of fact in the sentencing memorandum. Upon the offer of the defendant's counsel to furnish the information to the court and prosecutor, the court ruled that it was inappropriate to tender the information (48A).

Although it is not required that each statement in a presentence report be established or refuted by the presentation of evidence, a defendant should not be denied an opportunity to state his version of the relevant facts. United States v. Needles, 472 F. 2d 652, 658 (2d Cir. 1973).

In one case the Second Circuit, in vacating a sentence and in evaluating the trial court's refusal to hear defendant's counsel on information relating to misstatements in a presentencing report, stated:

> " . . . The result of the procedural irregularity is that the sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to miti-

> gation. If justice is to be done, a sentencing judge should know all the material facts. The information which was curtailed and precluded here should therefore have been received and considered. Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding. Harris v. United States, 382 U.S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965).
>
> "The judge, therefore, is required to listen and to give serious consideration to any information material to mitigation of punishment. We cannot say that if the judge had acted on the basis of complete and accurate information, verified by the prosecutor, it would have had no mitigating impact on the sentence. This is so although the judge, in his discretion, is not required to lighten the penalty even if there are mitigating circumstances. But no man can make valid judgments without knowledge of the facts . . . " United States v. Malcolm, 432 F. 2d 809, 819.

The defendant's counsel was prevented from having a full opportunity to present evidence of mitigating circumstances, evidence to correct any errors or mistakes, evidence showing that probation should be granted, or evidence that might otherwise have favorably influenced the court in passing sentence. Thus, the entire sentencing procedure was invalid as a violation of due process.

CONCLUSION

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S APPLICATION. RELIEF COULD NOT BE DENIED WITHOUT AN EVIDENTARY HEARING.

Respectfully submitted,

Brady, Tarpey, Downey, Hoey, P.C.

by Michael W. O'Sullivan
Michael W. O'Sullivan
attorneys for defendant-appellant
George C. Van Aken
84 William Street
New York, New York 10038
212-269-1010

dated in New York, New York
on Thursday 26 February 1976

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 1ST day of MARCH 1976

.....
Attorney for APPELLEE